

IN THE SUPREME COURT OF IOWA

NO. 15-0011

BERNARD J. WIHLM AND
PATRICIA M. BALEK

Appellee

vs.

SHIRLEY A. CAMPBELL, individually and as Executor
Of the ESTATE OF JOHN JOSEPH WIHLM, and as Trustee
Of the JOHN JOSEPH WIHLM REVOCABLE TRUST dated April 2,
2012 and PARTIES IN POSSESSION

Appellant

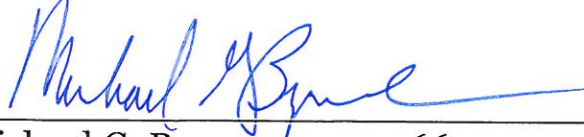
APPEAL FROM CERRO GORDO COUNTY DISTRICT COURT
THE HONORABLE JUDGE DEDRA SCHROEDER

APPELLANT'S REPLY BRIEF

Michael G. Byrne
WINSTON & BYRNE, P.C.
119 - 2nd St. N.W.
Mason City, Iowa 50401
Telephone: (641) 423-1913
Fax: (641) 423-8998
winstonbyrne@mchsi.com
ATTORNEYS FOR APPELLANT

CERTIFICATE OF FILING

I, Michael G. Byrne, hereby certify that I filed the attached Appellant's Reply Brief by EDMS on this 9th day of June, 2015



Michael G. Byrne , 00000662
WINSTON & BYRNE, P.C.
119 - 2nd St. N.W.
Mason City, IA 50401
Telephone: (641) 423-1913
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, Michael G. Byrne, hereby certify that I served the attached Appellant's Reply Brief EDMS to the following attorney of record:

Collin Davison



Michael G. Byrne, 000000662

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Reply to Appellee's Statement of the Facts

None of the asserted dates or proceedings of Appellee's Statements of the Case are disputed by the Appellant.

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ARGUMENT

I. Campbell's Notice of Appeal was Timely Filed.

The Trial Court entered its Decree November 7, 2014 and Appellant filed its Motion for Enlarged and Amended Findings of Fact pursuant to Rule 1.904(2) on Friday, November 22, 2014, 14 days later. Appellant's brief in support of the motion was filed timely on Monday, November 25, 2014, 17 days later, pursuant to computation of time, filing of documents as set out in the Iowa Code Section 4.1(34) as follows,

"The filing of a pleading or motion in a pending action...falls on a Saturday, a Sunday, a day on which the office of the Clerk of the District Court is closed...the time shall be extended to include the next day in which the office of the Clerk of the Court... is open to receive the filing..."

The Rule is that if any deadline falls on the weekend or holiday, the deadline is extended until the next court date. Accordingly, the 15 day deadline to file the 1.904(2) Motion fell on Saturday and under the

applicable statute Appellant timely filed its supporting brief on the following Monday.

Appellees seek to obtain a ruling from this Court that the 1.904 motion below itself was not merely untimely, but assert a timely motion was not a valid motion arguing it “merely rehashes” issues decided adverse to Campbell’s desires. Appellees cite Sierra Club Iowa Chapter v. Iowa Dept. Trans. 832 NW 2d 636 (Iowa 2013) as authority for this position. However Sierra Club, itself identifies other cases where the validity of the motion attached is noted be proper if:

- A. The Court is asked to examine facts and suspect the Court overlooked and requests an expansion of the judgment and review of that evidence. City of Waterloo v. Blackhawk Mutual Ins. Assoc., 608 NW 2d 442, 444 (Iowa 2000) quoted in Sierra Club at page 641; or
- B. The motion is filed as a mechanism to preserve error. LaMasters v. State, 821 NW 2d 856, 863 (Iowa 2012). A cursory reading of Defendant Appellant’s Motion for Enlarged and Amended Findings of Fact, and Conclusions of Law and Modified or Substituted Decree shows specific request for findings of fact to be enlarged or amended in 16 separate particulars; and six separate issues to review on the applications and conclusions of law. (App. pp. 34-38) Motion for Enlarged and Amended Findings of Fact and Conclusions of Law and Modified or Substituted Decree.)
- C. Appellant’s intent to modify and expand the Court’s review of the facts and applicable law with the ultimate goals of reversing the decree previously imposed by the Court and therefore property. Defendant’s Memorandum Brief in support of the Motion for Enlarged and Amended Findings of Fact,

Conclusions of Law, and Modified or Substituted Decree filed herein further illustrates this precise point. City of Waterloo v. Black Hawk Mut. Ins. Assoc, 608 NW 2d 442, 444 (Iowa 2000)

- D. Where, as here, the motion was filed as the district court failed to make sufficiently specific findings and conclusions. Meier v. Senecant, 641 NW 2d 532, 538-539 (Iowa 2002)

The issue of validity of the 1.904(2) Motion and the assertion here advanced, that the 1.904 motion was itself “not an appropriate means by which the Defendant can ask the court to reconsider.” (P. 4 of Appellee’s brief) was raised below in resistance to the 1.904 motion (App. p. 58)

This issue was adversely decided against the Plaintiff when the Court proceeded to consider the motion and denied the same on December 3, 2014. The Plaintiffs did not file a cross-appeal in order to preserve their argument that the Trial Court erred in its ruling below and cannot now raise this matter on appeal. Iowa Rule of Appellate Procedure 6.101(2) provides any Notice of cross appeal must be filed within the 30 day limit for filing a notice of appeal, or within 10 days after the filing of a notice of appeal, whichever is later. No notice of cross-appeal has been filed herein and therefore Appellee is barred from raising this issue of the validity of the original Rule 1.904 in this appeal. Krough v. Clark, 213 NW 2d 503(Iowa 1973). It is improper to limit Appellant’s rights or increase rights of

Appellee if no cross-appeal has been filed. Am Jur 2d - Appellate Review Section 328; ABC, Inc., V. Nameloc, Inc. 403 F. 3d 607, 610 (8th Cir 2005).

This Court has no record upon which this issue can be properly reviewed as Appellee failed to preserve in the alleged error by filing a Rule 1.904 motion on the timeliness issue itself or filing its notice of cross appeal as noted in the Rules of Appellate Procedure.

In Re Marriage of Oakland, 699 NW 2d 260, 267 (Iowa 2005) holds only that successive and repetitive 1.904(2) Motions do not toll the time prescribed for filing a notice of appeal. The Supreme Court in Oakland continues:

“The rule applies to give each party a bite of the apple to request a change or modification of an adverse judgment. This is the fairest way for the Rule to work.”

Appellee was required to file a 1.904(2) motion on the denial of Campbell’s 1.904 motion to preserve this error. Although Appellee asserts that it is attacking the timeliness of the Motion to Reconsider, it actually attacks the validity, content and purpose of the motion and if the lower court were to have found that was improper and invalid, then and only then is Appellee able to assert this issue. Only the timeliness of the Notice of Appeal is mandatory and jurisdictional. This has been met in this case. Milks v. Iowa Oto-Head and Neck Specialist PC, 519 NW 2d 801, 803

(Iowa 1994). Appellee is not entitled to now challenge the underlying validity and proper use of the 1.904(2) motion.

II. The Decree of the District Court is not Well Supported in Either Law or Fact.

This only two issues before the trial court were practicability and equitability of Appellant's proposed division in kind. It was attacked by Plaintiff Appellees on a much broader issue of inability to guarantee absolutely equal dollars and cents division between the parties at any later sale that Wihlm and Balek would determine to sell or liquidate their interests. (App. p. 418, 86) A review of the two issues follows:

A. Practicability.

Appellant assumes the correctness of the initial presumption favoring partition by sale, rather than partition in kind. (Iowa Rule of Civil Procedure 1.1201(2)(2014). Campbell asserts that she merely has the burden to overcome that presumption by preponderance of the evidence. Once Campbell has established practicality and equitability to that standard the Court is compelled to grant a partition in kind as Appellant seeks. Appellees sole focused objection as to practicality of the proposed division in kind is the need for a survey of the approximate 4.2 acres building site and the indefiniteness of 14.06 additional acres to Appellant to be surveyed

added extending the east line of the acreage. Rule 1.1218 specifically provides that it is the Court that shall allocate the property or share set off to each party. The means of a survey to accomplish the same is to be covered as cost distributed among the parties on a prorata basis.

The validity of the + or – indicated in Appellant’s proposal to the Court, Exhibit 107, is meant to allow the Court to define exactly the number of acres to be included or allocated defined by the survey of the approximate 4.2 acres so that equity of the parties can be reached on a fair market value analysis as presented by Fred Greder, the certified appraiser. (App. p. 413-415)

These appraisal address the variations in soil quality at pages 11- 19 of 49; 36 of 49; and 59 of Exhibit 6 and pages 3-5 of 32; 9-16 of 32, of Exhibit 7.(App. p. 203-211, 231, 262-264, 268-275). The comparable analysis set out in these two appraisal exhibits also shows the multiple factors considered by the appraiser in reaching his final value in his Assumptions (Exhibit 7, p 17-18 App. p. 276-277) and limiting conditions sections (Exhibit 6, pp. 23-24 (App. pp. 215-216)).

The thrust of Appellees’ argument that property of differing valuations of soil type and quality eliminate the practicality of division in kind and ignores the standard valuation utilized among buyers, sellers,

appraisers and auctioneers all utilizing these factors in order to obtain an estimated value of the property including Kuper and Behr. (App. p. 394, 395, 397, 404)

Finally, Appellees argument at page 34 raises the question at item iv of his argument that practicality cannot be determined because of the possibility of a lower price at which Appellee's land would ultimately be sold. This is a facetious argument, in that had evidence established that the appraisal was insufficient as of the day of trial, alternate valuations would have been presented by Appellees. The sole modification to Appellant's proposal Exhibit 106, 107 (App. p. 76-78) as to "practicability" of the partition would have been for the district court to reduce the number of total acres allocated to the Appellant to meet the need of an equitable division based on established values by adjusting the east line of the proposed 18.47 by survey further east or west. (App. p. 413). This is not an issue of practicality as asserted, but merely one of equitability. The proposal of the Defendant Campbell to the court at trial was clearly for the purpose of retaining 60 acre parcel in Cerro Gordo County and such other additional land to the north as would be available by survey to balance the equitable provisions of the request. Appellees resurrect their circular argument that the appraisal can never guarantee the sale price actually

realized would be the same as the educated appraisal. That is the burden of proof Appellants attempt to advocate and which the trial court adopted.

Having placed their entire argument on that basis, Appellees cannot now be heard to claim they have established the impossibility of establishing values of the real estate as of the day of trial.

B. Equitability.

The key dispute between Appellant and Appellee is the extent to which the Court consented to and adopted Appellees' basic position that only a sale of land in the future would determine the actual value of the property and no appraisal as of day of trial could guarantee the award of equal distributions pursuant to the appraisal as of day of trial.

Appellant overlooks that the lag of time upon which its argument is based would also affect Campbell's retained real estate award in kind. That property not being sold on the day of auction selected by Appellees would prevent any comparison as to stability or changes in Campbell's retained real estate as of day of trial, compared to the selected day of sale. This is an impossibility inherently within the concept of allowing any in kind partition of real estate under the Iowa Rules of Civil Procedure. The legal necessity is to allow the valuations of real estate as of day of trial only. Consideration of the impact of delayed sales to an unknown and unspecified date is

beyond the scope of the court's consideration or capacity. It is this which truly would be "a shot in the dark." (Order, App. p. 28)

Appellees provide no authority for the assertion that equitability requires an exactness of sale price ultimately reached by those who decide to sell their award of property in kind to the appraisal value fixed by the court on the day of trial. The choice to be made by the court by preponderance of the evidence: can the property be divided practically and will the division be equitable with the information available to the Court on the day of trial? If only actual sales of the property to be partitioned are equitable, the statute itself becomes meaningless. Iowa Rules of Civil Procedure 1.1201(2). Rule 1.1201(3) further indicates that where the partition can be made conveniently as to part of the premises but not for all, the court should have directed the remaining balance be sold. Expert testimony regarding valuation is the normal process by which non-sale valuations are assessed. 31A AmJr 2d Expert Opinion Evidence Section 329- 338.

C. Present Value versus Future Value.

The key issue in distinguishing between present value versus future value of land in the Court's ruling, set out at Page 6,

"The Rule is clear that the Defendant has a burden of proof to show that such partition in kind **will be** equitable and practical if a partition by

sale is to be denied by Plaintiff.” (Order page 6, App. p. 29). (emphasis added)

The Court includes in its determination of equitability the fact that if Plaintiffs proceed to sell their land, they will incur a potentially significant capital gains tax which Appellant Campbell would escape by in-kind partition. The Court ignores that Appellees could elect to hold their land without sale in order to minimize or eliminate their capital gains as well. Again, this is a consequence which only occurs in a division in kind where one party insists on sale. For the trial court to consider this issue allows the Plaintiffs to argue they must be treated the same or better as if the partition by sale were granted. If that argument can be utilized by the Court to defeat a partition in kind, again no party defendant could ever prevail in the circumstances of a partition dispute.

The trial court erroneously noted that “a compromise cannot be forced upon the Plaintiffs.” (Order, App. p. 29) The issue before the Court is not compromise, but application of the law. To the extent that the trial court later determines that the sale should be at public auction “unless the parties otherwise agree” (App. p. 30) again puts agreement of the parties, rather than legal determination of their respective interest, the hallmark of the Court’s decision.

To the extent that Appellant does not dispute the issues that must be decided on valuations being assessed as of the day of trial, Appellee has utterly failed to prepare and present evidence whereby the Court could look at present day valuations rather than future sale as predicated in the evidence and testimony witnesses as the standard utilized by Appellees at trial. To challenge the detailed and documented appraisals, Exhibits 6, and 7, Mr. Kuper asserts only that by sale can fair market value be determined and everything else is a guessing game. (App. p. 379). He clarifies however that is accurate only for that particular day. Kuper stated he had more respect for Fred Greder than anyone, but it was the appraisal concept against actual sale which is the only true appraisal. This is a rejection of all appraisals in favor of sales alone. Similarly, auctioneer Behr testified he had no challenge to Greder's appraisal as of July 24, 2014.

In reviewing the speculative estimates of subsequent sale values that Appellees ask the Court to consider in Table 1, following notations are appropriate:

1. Appellees have no difficulty establishing that 148.53 acres of tillable farm ground of the north Cerro Gordo county property, less the 14.06 +/- equals 134.47 acres. This negates their argument that adjustable variation complicates the calculations or makes it incalculable.
2. The 4.5% valuation used in Table 1 is based on a state-wide decline of all real estate including all grades of real estate.

Accordingly, Campbell's valuation of land retained would also need to be reduced by 4.5% in order to be an equitable comparison. (App. p. 380-381)

3. Thirdly, this is only one factor of all of the issues identified by Fred Greder in his valuation of the real estate and essentially assumes the validity of Fred Greder's underlying valuations in applying the discounts.
4. The 4.5% reduction goes from a date in the last six months prior to trial (App. p. 381) whereas Mr. Behr does not challenge the valuations given by Mr. Greder in his email of July 2014 (App. p. 399)

Table 2 at page 58 of Appellee's Brief similarly is an exercise in sheer speculation and without factual basis related to valuations as of date of trial. The 10% increase for Shirley's valuation of property alone is acknowledged as "solely for exemplary purposes." Under the testimony of Mr. Behr as to the state-wide average declines, one may discount Shirley's valuations by 4.5%. Behr admits he cannot be specific as to this land because he has not seen any tile map of the property (App. p. 403) He states he has no challenge to the July 24, 2014 appraisal value of Greder. (App. p. 405) Appellees assert that "fence line buyers are 'sometimes' willing to pay a premium." (App. p. 355-357.) However, only one potential buyer is mentioned and no level of financial interest is established.

Mr. Behr in his testimony indicates that he does not believe appraisals can accurately forecast the future because they are largely based

on historical values (App. p. 355) and factor in nearby or fence line buyers, his words “Because how do you know?” (App. p. 355) Again, this merely highlights that the attack on Mr. Greder’s appraisal is based upon conjecture and speculation which Behr indicates is unknowable as to factors until day of sale. (App. p. 408). Behr assumes an appraisal can be equitable only if all agree. This should be compared with Fred Greder’s testimony that the issues of strong buyers are factored into the appraisal as part of the comparable location of the property and the knowledge that certain property in certain locations has a tendency to be price supported by competing motivated purchasers. This is not speculation. This is based upon past comparable sales which gives the history for typical buyers in comparable locations and situations.

Finally, Appellees again assert that quality can only be reached if each party is given the opportunity to bid on the real estate themselves in order to promote the possibility of maximum competition. However, this again defeats the very purpose of the partition statute and the considerations that upon proof of equality and practicality in a division in kind, the prevailing party would not be required to bid against themselves in obtaining their right to the land without sale. It further increases speculation of outcome because it avoids the use of currently available solid numbers. (App. p.

353). If Appellees essentially assert only sale by auction can determine actual equitable value, they have forfeited their attack on actual testimony of value by Mr. Greder on day of trial and the court is compelled to find the available evidence presented meets the standard of equitability by preponderance of the evidence. (App. p. 412).

III. Conflict of Referee Appointed to Act as Auctioneer to conduct the sale is per se conflict of interest.

The Conflict of the referee appointed to supervise the sale and appointing an auctioneer who will in fact conduct the sale creates per se a conflict of interest in defining and recommending the terms of compensation. (Order, App. p. 32) It further creates the clear motivation for Behr to testify that an auction is the only reliable source of fair market valuation because it can only be determined as of the day of sale, not trial. (App. p. 397, 399, 408).

Further, Behr has indicated that projecting a value to a future date of sale is a 100% guess. He asserts past actual sales are outdated data and provide no indication of what someone may pay for the property. (App. p. 408) The proposed referee has testified as an expert witness on behalf of the Appellees in itself is an indication of bias which should exclude him

from serving in the role as referee. If a neutral referee appointed by the court were to select Behr after a comparison of available auctioneers, a neutral assessment of their experience, fees, and results eliminate the presumption of conflict. The court should not appoint someone to act as referee in a matter who is either biased or prejudiced to any party of the action or who has a personal interest in the subject matter of a decision in the case. Am Jur 2d 66, References, Section 18. Phillips v. Phillips, 104 NW 2d 52, (Neb. 1960). This language is particularly pertinent where the referee Behr is now called upon to employ himself as auctioneer to his own financial benefit.

Here, the Court did not consider any testimony as to services of other auctioneers as that matter was not presented to her during this aspect of the trial.

IV. No Award of Attorney Fees on Appeal should be Made.

A. Jurisdiction of the Court. Section 602.5112 of the Iowa Code provides the fees and costs may be awarded to the party in the appeal in the discretion of the Court of Appeals. No award of fees should be made based upon Appellant's request that the Court reverse the determination of the district court as to the prevailing party and in such case it is the appropriate

action for the Court of Appeals to remand this case to direct that a partition in kind, as prayed for by the Appellant, be granted and further that the award of attorney fees included in the Order under Appeal, but not yet determined by the district court should be set aside in its entirety. The district court should be directed to set a hearing for fees on Appellant's work and review in the trial court level and at the discretion of the Court of Appeals at that level.

This is not a case where the award of Appellate fees is mandated by statute or by contract, and the same rests in the equitable discretion of the court of appeals. The primary controlling factor in award of attorney fees is the ability of the respective parties to pay, depending upon financial circumstances and earnings of each, and each party's resources. In re: Marriage of Hayne, 334 NW 2d 347 (Iowa App. 1983).

B. Award of attorney fees is discretionary. Here each party has substantial assets in the real estate alone, and each should pay their own fees in appeal from the assets under consideration. Each has valuation of real estate in excess of \$1 million. Appellees have resources of over \$2 million as they represent 2/3 of the total equity in the property.

Here, the request for fees should be denied as Appellees have not submitted any billing statement or claim of entitlement for services to be

reviewed and considered by the Court subject to the challenge of Appellant. Issues regarding the nature and extent of service, the amount of time involved and responsibilities assumed cannot be considered without the same. Vaughan v. Must, Inc., 542 NW 2d 533, 541 (Iowa 1996).

Accordingly, the Supreme Court should exercise discretion and deny award to Appellees as to attorney fees on appeal and enter an order reversing the award of attorney fees to Appellees below.

CONCLUSION

Wihlm and Balek continue to argue that they are entitled to proof that a division in kind would be as advantageous to them as a partition by sale for Campbell to meet her burden of proof by preponderance of the evidence. Equitable is defined as an approximate equality, not an exact one. Black's Law Dictionary.

The Varnell case only holds that owners of real estate sold or partition are entitled to the highest price available, not that equity means guaranteeing the highest price available. Varnell dealt with the obligation of the Court to review the sale procedures after the fact and set aside any sale not sufficiently productive of best available price. Varnell did not indicate best possible price was an element of the equitability of partition in-kind. Varnell v. Lee, 14 NW 2d 708, 714 (Iowa 1944).

RENEWAL OF REQUEST FOR ORAL ARGUMENT.

Appellant Campbell renews and requests oral argument on the grounds that the legal and logical argument can best be examined by the opportunity for direct questioning of counsel by the Court.

Respectfully Submitted,

WINSTON & BYRNE,
Lawyers
A Professional Corporation

By: 
Michael G. Byrne, 0000662

119 - 2nd St. N.W.

Mason City, IA 50401

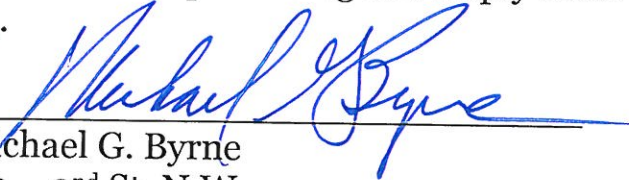
Phone: 641-423-1913

Fax: 641-423-8998

ATTORNEY FOR DEFENDANT/ APPELLANT

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the cost of producing this Reply Brief was in the amount of \$_____0_____.


Michael G. Byrne
119 - 2nd St. N.W.
Mason City, IA 50401

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Dated

June 09, 2015

Michael G. Byrne
Michael G. Byrne